IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

Criminal Appeal No.197 of 2002

Baban @ Yeshwant Vithal Katalkar — Appellant

Vs.

The State of Maharashtra — Respondent

Mrs.Anjali Patil for appellant.

Mr.A.S.Shitole, APP for State.

CORAM: B.H.MARLAPALLE, J.

July 23, 2007.

ORAL JUDGMENT:

1. This appeal filed under Section 394 of Cr.P.C. arises from the order of conviction and sentence passed by the learned Addl. Sessions Judge, Greater Mumbai on 31/1/2002 in Sessions Case No.1239 of 1993. The appellant-accused has been convicted for the offence punishable under Section 376(2)(f) of IPC and is sentenced to undergo RI for ten years and to pay a fine of Rs.1000/- in default of payment of fine, he is to undergo further S.I. for six months. The accused is entitled to be given set off in respect of

his detention as an under-trial. It is stated by Mrs.Patil, the learned counsel for the appellant that he was taken in custody immediately after the order of conviction and sentence was pronounced and came to be released on bail on 6/1/2007.

2. As per the prosecution case the prosecutrix was staying with her parents in the neighbourhood of the accused and on 12/7/1993 she was watching T.V. in the house of the neighbour i.e. Mr.Nair. The accused opened the door between 9 to 9.30 p.m., bolted it from inside, dragged the prosecutrix on the bed and committed rape on her. The prosecutrix being of about nine years of age suffered injuries on her genitals and started bleeding profusely. She regained her consciousness after about two hours and did not see any one else in the house of the neighbour. She went crying to her mother who was cooking in her house and pointed at the blood stained undergarments as well as the blood stains on her legs. Her mother - PW 1 washed her clothes and after her husband returned home at 10.15 p.m. she did not disclose the incident as she was scared and worried about the family's prestige. However, on the next day when the prosecutrix started having pains PW 1

told the incident at about 6.30 p.m. to her husband and thereafter they went to the police station to lodge a complaint. C.R.No.155 of 1993 was registered under Section 376 of IPC on 13/7/1993 and the accused was taken in custody after he was identified by PW 1. Both, the prosecutrix as well as accused, were sent for medical examination. While in custody the accused had volunteered to point out the clothes worn by him and the undergarments thrown in the gutter. The clothes were seized, the blood stained and washed clothes of the victim girl were also seized and sent for CA examination. On completion of investigation the police filed the charge-sheet on 7th October 1993.

3. The prosecution examined in all eight witnesses i.e. Hansabai - PW 1 - the complainant, PW 2 - the prosecutrix, PW 3 - panch for recovery of the clothes on the person of the prosecutrix, PW 4 - Mr.Nair - the neighbour, PW 5 - panch for the panchanama of scene of offence (Exh.14), PW 6 - Dr.Vijay Kelwekar who examined the victim as well as the accused on 14th July 1993. PW 7 is the panch for recovery of clothes of the prosecutrix and PW 8 - M.P.Bhoj was the Investigating Officer.

4. PW 1 - Hansabai is the mother of the prosecutrix and had a son and another daughter. She was staying with her husband and three children and on the date of incident she was residing at Room No.296/A, Chawl no.37, Gaikwad Nagar, Malvani, Malad (West) and the accused was one of her neighbours. They used to visit each other's house. Some South Indian families were also in her neighbourhood and she had cordial relations with them. On the date of the incident while she was in the house between 9 p.m. to 9.30 p.m. the prosecutrix came crying from the neighbour's house where she had gone to watch TV and said "see what has happened to me" and showed her frock and undergarment. The mother noticed that there were blood stains. The prosecutrix told her that while she was watching television the accused entered the neighbour's house, closed the door, pressed her mouth and held her hands, made her lie on the floor, removed her undergarment and raped her. The mother after learning the incident gave bath to the prosecutrix and she was scared and was crying all the time. She could not understand what had happened. The blood stained clothes were washed by her and her husband returned very late in the night.

She was scared and, therefore, could not disclose the incident to her husband and on the next day he had gone for his work and when he returned in the evening she had disclosed the incident to him. Both of them went to the police station, filed a complaint (FIR Exhibit 9). While in the witness box, she identified the clothes of the prosecutrix which she had washed and which were blood stained, which were shown to her in the Court. She admitted that she had not visited the neighbour's house where the incident had taken place. She confirmed that name of the South Indian neighbour was Mr.Nair and his family consisted of husband, wife and son whereas the family of the accused consisted of his parents, brother, sister-in-law and children of the brother. She also admitted that the house keys of Mr.Nair were left with her and the prosecutrix was watching TV in Mr.Nair's house. In the cross-examination she admitted that the room of the accused was adjoining to her room and probably there were five to six rooms in the said chawl whereas the room of Mr.Nair was opposite to the room of the accused. Her husband was employed in the Malvani area for the work of printing clothes. He used to leave house at 7 a.m. and return home after 9 p.m. At the time of the

incident, the prosecutrix was not aware of the menaing of rape. In the cross-examination she also admitted that when the daughter started crying and compaliend of bleeding, she had lifted the frock and saw that there were blood stains and there were blood marks between her legs. She proved the FIR she had lodged.

5. PW 6 Dr.Vijay Harishchandra Kelwekar was the Medicial Superintendent, Rural Hospital, Pen and he stated that the prosecutrix was brought to his hospital on 14/7/1993 by the Woman Police Constable No.225 from Malvani police station and after obtaining the consent of the mother, the prosecutrix's medical examination was undertaken. The girl had given history as was earlier told to her mother regarding the incident. He noted that she had not started her menarche and on examination he found the following injuries (medical certificate - Exh.16):

> The inner lips of Labia minora with external surface of hymen lower half part had abrasions all over. It was red colour, tender, fresh. The hymen was circular and intact. The

vaginal orifice admitted tip of little finger.

. He also examined the accused at Exhibit 19 and found some injuries on his penis. The blood group of the prosecutrix turned out to be "B" as per the CA report at Exhibit 17 collectively and blodd group of the accused was "B" as per Exhibit 18. On the clothes of either the accused or the prosecutrix blood stains or spots of semen could not be detected and obviously because the medical examination was done two days later. The clothes of the prosecutrix were washed and undergarments of the accused were recovered from a drain. PW 6 in his examination stated that the injury found on the accused was possible by forcible thrust of penis into the vaginal orifice and he identified the accused in the Court as the same person who was examined by him on 14/7/1993 and issued the medical certificate at Exhibit 19. He also stated that the injury noticed on the accused was fresh i.e. it must have been caused within 24 hours. He further stated that the injury noted on the penis of the accused would not have been possible except if he held the same in his hands and gave it a cut. He also stated that the injury suffered by the girl was possible while forcible thrust of the penis.

6. This medical evidence of PW 6 when read with his oral depositions and the medical certificates and CA reports at Exhibits 16 to 20, clearly went to show that the prosecutrix was subjected to sexual assault on 12/7/1993 between 9 to 9.30 p.m. She had suffered bleeding injury in the same and at the same time the accused also had suffered bleeding injury on his genital while trying to have sexual intercourse forcibly. The I.O. PW 8 stated in his depositions that the prosecutrix was born on 24/6/1984 and obtained birth certificate from the Bombay Municipal Corporation. He also recorded the statement of the victim's father. The birth certificate as produced on record was not disputed by the defence and, therefore, it was clear that the prosecutrix was about nine years of age when the incident had taken place.

7. On the identification of the accused and his involvement in the incident, the prosecutrix was examined in camera on 19/12/2001. She stated that she was studying in the Municipal School of Gujarathi medium in July 1993 and she had a Maharashtrian family as her neighbours. On the date of the

incident in the evening she had gone to the house opposite her house for watching television (in the house of a Madrasi family) and at that time her mother was at home. While she was watching TV somebody closed the door and noticed that it was the accused. She was sitting on the floor to watch TV. The accused bolted the door, pressed her mouth with his hand and made her lie on the floor. He lifted her frock, removed her undergarments and thereafter she did not know what had happened. After some time when she gained consciousness she saw that there was no one and she went to her house and told everything to her mother. She was wearing a frock and went to the mother crying as she was having severe pain at the place of urination and therefrom she was bleeding. She did not know the reason for bleeding. Her mother gave her bath, changed her clothes and after food she went to sleep. On the next day she, her sister and brother had gone to the school and on return her mother had taken her to the house of the maternal uncle. Her father returned from job in the evening and she was still getting severe pain. AFter her mother disclosed the incident to her father all the three had gone to the police station. She identified article no.1, the underwear and article

no.2 she did not remember. She was specifically asked a question by the APP regarding the cause of injury and she felt that probably it was because the accused had tried to insert his finger. The prosecutrix was subjected to a detailed cross-examination and nothing could be brought on record to disbelieve her date of birth, her statement that it was the accused who had caused her injury. Before that he had lifted her frock, removed undergarment, she was made to lie on the floor and inflicted injury which was bleeding. She has identified the accused and when the incident had taken place she was of the age when she could remember and describe the details before the Court after eight years. Accused was her next door neighbour and the families were known to each other and had cordial relations. PW 1 - mother clearly stated that after the investigation the Investigating Officer came to her house, she had shown the accused on the next day and he was taken in custody. The accused did not examine any witnesses in his defence that he was not involved in the incident. In his statement under Section 313 of Cr.P.C. he has also denied about his medical examination conducted by PW 6 but he failed to explain the cause of the genital

injuries he had suffered. Thus the prosecution proved the involvement of the accused in the incident. However, the act of penetration could not be proved by the prosecution though attempt to commit rape on the prosecutrix has been duly proved and it was the accused who attempted to rape the prosecutrix. In the case of Ramkripal s/o Shyamlal Charmakar vs. State of Madhya Pradesh **[2007 AIR SCW 2198]** their Lordships in paras 15 and 16 stated thus:

> "15. An attempt to commit an offence is an act, or a series of acts, which leads inevitably to the commission of the offence, unless something, which the doer of the act neither foresaw nor intended, happens to prevent this. An attempt may be described to be an act done in part execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and, possessing, except for failure to consummate, all the elements of the substantive crime. In other words, an attempt consists in it the intent to commit a crime, falling short of, its actual commission or consummation/completion. It may consequently

be defined as that which if not prevented would have resulted in the full consummation of the act attempted. The illustrations given in Section 511 clearly show the legislative intention to make a difference between the cases of mere preparation and an attempt.

16. The sine qua non of the offence of rape is penetration, and not ejaculation. Ejaculation without penetration constitutes an attempt to commit rape and not actual rape. Definition of "rape" as contained in Section 375 of IPC refers to "sexual intercourse" and the Explanation appended to the Section provides that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. Intercourse means sexual connection. In the instant case that connection has been clearly established. Courts below were perfectly justified in their view."

. The position of law as reiterated by their Lordships in the above words goes in favour of the accused and the conviction for the offence punishable

under Section 376(2)(f) is unsustainable. However, at the same time the evidence of the prosecution, having regards to the above stated legal position by the Apex Court, does prove his involvement in an offence punishable under Section 511 of IPC as he had attempted with all preparations to commit the rape on the prosecutrix who was of the age of less than 12 years. He is thus liable to be convicted for an offence punishable under Section 511 of IPC.

8. For the offence punishable under Section 376(2)(f) of IPC the sentence prescribed is RI for a term which shall not be less than ten years but which may be for life and shall also be liable to fine. In the instant case by the impugned order of sentence the trial Court has awarded RI for ten years and fine of Rs.1000/- and in default to suffer SI for six months more. He was also an undertrial prisoner for some time and, therefore, he is entitled for set off. Under Section 511 of IPC whoever attempts to commit an offence punishable under the Code with imprisonment for life or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by the Code

for the punishment of such attempt, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence, or with such fine as is provided for the offence, or with both. The accused was of the age of 18 years at the relevant time. During the trial he was married and has his family. He has already completed a sentence of about five years and paid the fine amount as well.

9. In the premises, the appeal is allowed partly. The order of conviction and sentence passed by the learned Addl. Sessions Judge for Greater Mumbai in Sessions Case No.1239 of 1993 on 31st January 2002 under Section Section 376(2)(f) of IPC and impugned in this appeal is hereby quashed and set aside and instead the accused is convicted for the offence punishable under Section 511 of IPC and he is sentenced to suffer RI for five years and to pay a fine of Rs.1000/- in default to suffer further S.I. for three months. He shall be entitled for set off, if applicable, under Section 428 of Cr.P.C. As the accused has already undergone the sentence and paid

the fine amount, he is not required to surrender to his bail bonds to suffer any further sentence. Hence his bail bonds stand cancelled and he would stand released from the sentence as he has completed the same.

. A copy of this order be forwarded forthwith to the concerned Sessions Court as well as the jail.

(B.H.MARL